

LEGISLATURE - Dual officeholding by member of legislature;
PUBLIC OFFICE - Dual officeholding by member of legislature
PUBLIC OFFICE - Eligibility for Board of Review;
REVIEW, BOARD OF - Dual officeholding by member of legislature;
REVIEW, BOARD OF - Eligibility for Board of Review;
MONTANA CONSTITUTION - Article V, section 9;
MONTANA CODE ANNOTATED - Sections 5-2-104, 30-16-301, -302;
OPINIONS OF THE ATTORNEY GENERAL – 40 Op. Att'y Gen. No. 46 (1984), 35 Op. Att'y Gen. No. 90 (1974), 19 Op. Att'y Gen. No. 155 (1941), 8 Op. Att'y Gen. 393 (1920).

- HELD: 1. The President of the Senate and the Speaker of the House are prohibited by article V, section 9 of the Montana Constitution and by Mont Code Ann. § 5-2-104 from appointing a legislator as a member of the Board of Review as provided by Mont Code Ann. § 30-16-302.
2. Designating a legislator as a nonvoting member does not circumvent this prohibition.
3. Under Mont. Code Ann. § 30-16-301, the President and the Speaker can appoint a nonlegislator as a member of the Board.

January 14, 2002

Mr. Kurt G. Alme
Director
Montana Department of Revenue
P.O. Box 5805
Helena, MT 59604-5805

Dear Mr. Alme:

You have requested my opinion concerning the following question:

Does the appointment of a legislator as a member of the Board of Review, under Mont. Code Ann. § 30-16-302, conflict with article V, section 9 of the Montana Constitution and Mont. Code Ann. § 5-2-104, and if so, can a nonvoting legislator be appointed?

Your question requires an interpretation of article V, section 9 of the Montana Constitution and Mont. Code Ann. § 5-2-104. Article V, section 9 provides:

No member of the legislature shall, during the term for which he shall have been elected, be appointed to any civil office under the state.

Article V, section 9, is nearly identical to article V, section 7 of the 1889 Montana Constitution. Further, 1972 Constitutional Convention notes indicate that the delegates meant to retain the provision and that only minor changes in grammar were made to this section. 40 Op. Att'y Gen. No. 46 (1984) at 184 should be consulted for a history of the constitutional provision.

Mont. Code Ann. § 5-2-104 provides, in pertinent part:

- (1) No member of the legislature may, during the term for which he was elected, be appointed to any civil office under the state.

Since the Montana Constitution and Montana law clearly prohibit legislators from being appointed to civil office, the issue becomes whether membership on the Board of Review would qualify as a civil office.

In 1981, the legislature enacted the Montana Small Business Licensing Coordination Act (Act) codified at Mont. Code Ann. § 30-16-101. The Act outlined a plan for streamlining the registration and licensing procedures of certain state agencies. See Mont. Code Ann. § 30-16-301. This plan is commonly referred to as the One-Stop Licensing Program (Program). A Board of Review (Board) was created to provide policy direction to the Department of Revenue (Department), which is charged with implementing and operating the Program. See Mont. Code Ann. § 30-16-302.

The 2001 Legislature attached the Board administratively to the Department. See Mont. Code Ann. § 30-16-302(5). Section 30-16-302 provides in pertinent part:

The board of review includes the directors of the departments of agriculture, labor and industry, environmental quality, livestock, revenue, justice, and public health and human services, the secretary of state, a member appointed by the president of the senate, and a member appointed by the speaker of the house.

Mont. Code Ann. § 30-16-302 (emphasis added).

The Board is directed by the legislature to:

- (3) . . . meet at the call of the presiding officer at least once each calendar quarter to:
 - (a) establish interagency policy and guidelines for the plan;
 - (b) review findings, status, and problems of system operations and recommend courses of action; and
 - (c) receive reports from industry and agency task forces that the board of review may request to inquire into particular issues.
- (4) The board of review may implement a plan for streamlined registration and licensing to include licenses not specified in 30-16-301, as provided in 30-16-303.

Mont. Code Ann. § 30-16-302.

The subject of dual officeholding and what constitutes a "public office of a civil nature" has been the subject of several past Attorney General's Opinions. As cited in each opinion, the most significant Montana case on the subject is Barney v. Hawkins, 79 Mont. 506, 257 P. 411 (1927). In Barney, the Montana Supreme Court set forth the following five-part test for determining whether a certain position qualifies as a "public office of a civil nature" and is thereby affected by the above-cited constitutional and statutory language.

- (1) It must be created by the Constitution or by the Legislature or created by a municipality or other body through authority conferred by the Legislature; (2) it must possess a delegation of a portion of the sovereign power of government, to be exercised for the benefit of the public; (3) the powers must be defined, directly or impliedly, by the Legislature or through legislative authority; (4) the duties must be performed independently and without control of a superior power, other than the law, unless they be those of an inferior or a subordinate office, created or authorized by the Legislature, and by it placed under general control of a superior body; (5) it must have some permanency and continuity, and not be only temporary or occasional. In addition, in this state, an officer must take and file an official oath, and give an official bond, if the latter be required by proper authority.

Barney, 79 Mont. at 528-29.

Applying Barney, the following positions were found to be civil offices under article V,

section 9 of the Montana Constitution: a county high school trustee, 8 Op. Att'y Gen. at 393 (1920), a member of a local government study commission, 35 Op. Att'y Gen. No. 90 at 252 (1974), and a member on the State Soil Conservation Committee, 19 Op. Att'y Gen. No. 155 (1941).

With regard to whether a legislator may be appointed as a member to the Board, the same legal analysis set forth in Barney and its progeny applies. Under Barney, the first prong is met if the position is created by the legislature. Here, the Board was created by the legislature's enactment of Mont. Code Ann. § 30-16-302. The second prong of Barney requires that some portion of sovereign power be delegated for the benefit of the public. Since the Board has administrative rule-making authority under Mont. Code Ann. § 30-16-302, it clearly has been delegated executive powers designed to benefit the public, specifically small business owners.

Barney's third prong requires that the powers to be discharged must be defined by the legislature. The legislature clearly defined the duties of Board members in Mont. Code Ann. § 30-16-302. The fourth prong provides that duties must be performed without supervision. Though statute provides for the appointment of a presiding officer, the officer does not supervise the Board nor does the statute provide for any supervising body. Mont. Code Ann. § 30-16-301. The fifth prong provides that the position must have permanency and continuity. The statutes provide no limit on the Board's duration, thus it exists for a permanent and continuous duration. Finally, though an oath of office is not a requirement for Board membership, past Attorney General's Opinions have reached the conclusion that a civil office exists without addressing the requirement that there be an actual oath of office. See 35 Op. Att'y Gen. No. 90 (1975); 19 Op. Att'y Gen. No. 155 (1941). Accordingly, membership on the Board qualifies as an appointment to civil office because it meets the five requirements set forth in Barney.

You also inquire whether the President and the Speaker can appoint a legislator as a "non-voting member" of the Board. I note initially that no statutory authority exists for the appointment of "non-voting members" of this Board, nor do the statutes set forth a requirement that Board members be allowed to vote at all. Thus, while the legislative leadership certainly has the power to designate members of the legislature to attend and participate in Board meetings, as any member of the public might, see Mont. Code Ann. tit. 2, ch. 3, there does not appear to be any authority supporting the idea that legislators could be designated as "nonvoting members" of the Board.

Even if "nonvoting member" status existed, in my opinion, the result of the inquiry would not change. Arguably, less sovereign power is delegated to a nonvoting member under the second prong of the Barney test; however, the nonvoting member is still able to participate and exert influence in Board business. Thus, the second prong is still met. Further, the statutes provide no exception for nonvoting appointments to civil offices.

The rules of statutory construction require me "simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted." Mont. Code Ann. § 1-2-101. Therefore, the President and the Speaker are also prohibited from appointing a "nonvoting" legislator as a member of the Board.

The President and the Speaker can appoint a nonlegislator as a member of the Board. The Board includes "a member appointed by the president of the senate, and a member appointed by the speaker of the house." Mont Code Ann. § 30-16-302 (emphasis added). *Member* refers to Board membership, not legislature membership. In construing a statute, a court must look at "each statute as a whole so as to avoid an absurd result 'and to give effect to the purpose of the statute.'" Infinity v. Dodson, 2000 MT 287, ¶ 46, 302 Mont. 209, 14 P.3d 487 (2000) (citing Christenot v. Department of Commerce, 272 Mont. 396, 401, 901 P.2d 545, 548 (1995)). This "whole statute interpretation" is based upon the idea that a statute is passed as a whole and should not be read as a "series of unrelated and isolated provisions." Gustafson v. Alloyd Co., 513 U.S. 561, 570 (1995). Further, identical words used in different parts of the same act are intended to have the same meaning. Id. (citing Department of Rev. of Ore. v. ACF Industries, Inc., 510 U.S. 332, 342 (1994)).

In reading Mont Code Ann. § 30-16-302 as a whole, it is clear and unambiguous. Throughout section 30-16-302, the term "member" is consistently used in reference to a "member" of the Board of Review. Thus "member" means a member of the Board and the language of the entire statute supports such an interpretation. Under Mont Code Ann. § 30-16-302, the President and Speaker can appoint a member to the Board and, as determined above, that member cannot be a legislator. Accordingly, the president and speaker can appoint a nonlegislator as a member of the Board.

THEREFORE, IT IS MY OPINION:

1. The President of the Senate and the Speaker of the House are prohibited by article V, section 9 of the Montana Constitution and by Mont Code Ann. § 5-2-104 from appointing a legislator as a member of the Board of Review as provided by Mont Code Ann. § 30-16-302.
2. Designating a legislator as a nonvoting member does not circumvent this prohibition.
3. Under Mont. Code Ann. § 30-16-301, the President and the Speaker can appoint a nonlegislator as a member of the Board.

Very truly yours,

MIKE McGRATH
Attorney General

mm/pdb/dm